The Other Side of Ejusdem Generis

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I believe Mr. Torbert's engaging article to be accurate in asserting that the doctrine of ejusdem generis receives a rather cursory treatment in law schools. I say this because, as a second-year law student, my first encounter with the doctrine came when the editors of the *Scribes Journal* asked me to write this brief analysis.

Mr. Torbert observes that drafters often use enumerations — typically constructed with a general word or phrase *following* a list of specific words. He asks the reader to consider this example: *any house, flat, cottage, or other building*. Because the phrase *or other building* could be read to mean all other buildings or only residential buildings like those specifically enumerated, the phrase is ambiguous. Therefore, courts use ejusdem generis to limit the general phrase to only those things of the same kind or class as those specifically listed, reasoning that the specific terms would be superfluous if the general term were all-encompassing. Admittedly, this already sounds somewhat confusing. Still, courts agree that when the general language follows the specific language, ejusdem generis may be applied.

But how do the courts treat the more atypical situations in which enumerations are constructed with the general word or phrase *preceding* the list of specific words? Take, for example, the following: *earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting.* Here, the general term, *earth movement*, precedes the specific examples of *earthquake, landslide, mudflow, earth sinking, earth rising or*

shifting. Does ejusdem generis still apply? The phrase *including but not limited to* seems to indicate that the list of specific examples is not exhaustive. And the specific terms all share a common characteristic in that they result from some sort of sudden, large-scale natural phenomenon. So the general term *earth movement* should be limited to movement that results from catastrophes that are consistent with the specific examples, right? Well, not exactly. When the typical order of the specific and general terms is switched, courts disagree over whether ejusdem generis still applies.

Let's begin our exploration — as many courts do — with a secondary authority: *Sutherland Statutes and Statutory Construction*. This source, in its sixth edition, explains the typical ejusdem generis pattern as follows:

> Where *general words follow* specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.[1]

Interestingly, though, beginning with the fourth edition in 1984, *Sutherland* amended and expanded this explanation by adding the following language:

> Where the opposite sequence is found, i.e., *specific words following* general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated.[2]

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[1] Norman J. Singer, *Sutherland Statutes and Statutory Construction* vol. 2A, § 47.17 (6th ed., West 2000) (emphasis added).

[2] Norman J. Singer, *Sutherland Statutes and Statutory Construction* vol. 2A, § 47.17 (4th ed., Callahan & Co. 1984) (emphasis added).

Another secondary source — *Black's Law Dictionary* — defines *ejusdem generis* like this:

> A canon of construction that when a *general word or phrase follows* a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.[3]

In the recent editions of *Black's*, this definition has not changed to include the broader definition that *Sutherland* has included since 1984.

Let's now return to the previous example that puts the general words first — *earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting.* A court looking to *Sutherland* for its definition of *ejusdem generis* would probably limit *earth movement* to only certain types of sudden, naturally occurring causes such as those specifically enumerated. But a court using *Black's* might well decide that since the general term precedes the specific terms and the source doesn't mention the opposite sequence, the doctrine should not apply. It's fascinating to think that the outcome could rest on which secondary source the court turned to.

As you may have guessed, the earth-movement example is not merely hypothetical but is taken directly from an exclusionary clause found in many insurance policies. Does the exclusion apply to all earth movement or only movement caused by large-scale natural catastrophes? Will the courts still apply ejusdem generis in cases like this? I found more cases saying yes than no.

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[3] *Black's Law Dictionary* 556 (Bryan A. Garner ed., 8th ed., West 2004) (emphasis added).

In *Holy Angels Academy v. Hartford Insurance Group*,[4] for instance, the court had to interpret the earth-movement exclusion after a plaintiff's buildings were damaged by underground construction of a rapid-transit system. The court decided that ejusdem generis did indeed apply, holding that the phrase was "limited in application to natural phenomena."[5] Thus, the insurance company could not invoke the exclusion and had to pay. This decision seems to make good sense, and applying ejusdem generis when the general term comes first appears to be the majority view.[6]

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[4] 487 N.Y.S.2d 1005 (N.Y. Sup. Ct. 1985).

[5] *Id.* at 1007; for other cases applying ejusdem generis to the earth-movement exclusion, see *Govt. Employees Ins. Co. v. DeJames*, 261 A.2d 747, 752 (Md. 1970); *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 361 N.W.2d 446, 451 (Minn. App. 1985); *Wis. Builders, Inc. v. Gen. Ins. Co. of Am.*, 221 N.W.2d 832, 837–38 (Wis. 1974).

[6] *See, e.g.*, *Martin v. Holiday Inns, Inc.*, 245 Cal. Rptr. 717, 719 (Cal. App. 5th Dist. 1988) (interpreting the phrase *personal property, wearing apparel, trunks, valises or baggage* to not include a car and trailer); *State v. Kavajecz*, 80 P.3d 1083, 1087–88 (Idaho 2003) (interpreting the phrase *any lewd or lascivious act or acts . . . including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact* to not include kissing a child's chest); *Berlanger v. Warren Consol. Sch. Dist.*, 443 N.W.2d 372, 375–76 (Mich. 1989) (interpreting the phrase *other than . . . a classroom teacher, including but not limited to, a superintendent, assistant superintendent, principal, department head or director of curriculum* to be limited to administrators and not include counselors); *Bd. of Chosen Freeholders v. State*, 732 A.2d 1053, 1059 (N.J. 1999) (interpreting the phrase *judicial costs . . . including but not limited to the following costs: salaries, health benefits and pension payments of all judicial employees, juror fees and library material costs* to not include the capital costs of judicial facilities); *Bjurstrom v. Or. Lottery*, 120 P.3d 1235, 1240–41 (Or. App. 2005) (interpreting the phrase *mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety* to be limited to serious misconduct undermining an agency's public mission); *Wenzel v. City of New Braunfels*, 852 S.W.2d 97, 100 (Tex. App. Austin Dist. 1993) (interpreting the phrase *special defects such as excavations or roadway obstructions* to not include inadequate lighting or uncontrolled parking and street crossing by pedestrians).

But the Texas Court of Appeals came to a different conclusion in *Jones v. St. Paul Insurance Company*.[7] The roof of a commercial building had collapsed because moisture variations caused soil to expand and contract. The court was faced with the same language as in *Holy Angels Academy*, and the plaintiff made essentially the same argument — that the gradual soil movement was not like the sudden, large-scale phenomena described by the specific terms.[8] But the court held that ejusdem generis did not apply because "the general words, earth movement, do not follow the specific words, but precede them."[9] This decision is completely at odds with the decision in *Holy Angels Academy*. Although the approach taken by the court in *Jones* appears to represent the minority view, other courts have based their decisions on similar logic.[10]

This entire interpretation problem could have been avoided, as Mr. Torbert's article points out, if the drafter had simply made completely explicit what he or she was trying to say. Consider how the Chinese, or writers in nearly every other language for that matter, might have worded the clause in question: *earth movement that results from earthquakes, landslides, mudflows, or other such sudden, natural phenomena* (narrow meaning). Or: *earth movement of any kind, including movement from sinking, rising, or otherwise shifting* (broad meaning). Worded either way, the clause leaves little room for misinterpretation. It is what it should be — explicit and transparent.

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[7] 725 S.W.2d 291 (Tex. App. Corpus Christi Dist. 1987).

[8] *Id.* at 292.

[9] *Id.*

[10] *See, e.g., No Time, Inc. v. Ariz. Dept. of Revenue*, 2005 WL 4891675 at *3 (Ariz. App. 1st Div. Feb. 15, 2005); *Brown v. Farm Bureau Gen. Ins. Co.*, 730 N.W.2d 518, 522 (Mich. App. 2007); *Cuppett v. Neilly*, 105 S.E.2d 548, 559 (W. Va. 1958).